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### Justice Stephen Breyer: The Active Liberty Approach Applied

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*University at Albany, State University of New York*

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**Justice Stephen Breyer  
The Active Liberty Approach Applied**

Rukayatu Tijani  
Thesis Advisor: Julie Novkov  
May 12, 2011





with attention to the practical consequences of government decisions, can help guide courts to the proper outcome in concrete cases.<sup>5</sup>

Since Justice Breyer is regarded as a liberal interpretivist, we need to see if he uses the “Active Liberty” rationale to justify Supreme Court outcomes that are relatively liberal. In this paper, I present a two-part hypothesis in order to find out not only whether Justice Breyer interprets the Constitution consistently with his interpretational methodology, but also whether he uses this interpretational methodology as a means to a liberal or conservative end. The hypotheses I present are: 1) Justice Breyer uses the Active Liberty approach as a means to justify his opinions, dissents and concurrences; and 2) For cases in which Justice Breyer uses this approach, (if we successfully establish whether he uses it in any case), the “Active Liberty” approach of Constitutional interpretation is more likely to be used as a means to a liberal than a conservative outcome.

In this paper, I plan to do several things:

- Discuss the importance of my analysis of this issue.
- Operationalize the term Active Liberty.
- Look at one of the six subject areas that Justice Breyer expounds upon in his book *Active Liberty*. In *Active Liberty*, Justice Breyer talks a bit about what his general approach would be to solving cases in each of the following subject areas: speech, federalism, privacy, affirmative action, statutory interpretation and administrative law. For this paper, I will look at affirmative action cases to see if Justice Breyer uses the active liberty approach.

<sup>5</sup> Ryan JE. Does It Take a Theory? Originalism, Active Liberty, and Minimalism: Active Liberty: Interpreting Our Democratic Constitution By Stephen Breyer. New York City: Knopf, 2005: Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America By Cass R. Sunstein. Cambridge: Basic Books, 2005. *Stan. L. Rev.* 2006;58: 1623–1997. Pg 1629

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more malleable and adaptive interpretation of the Constitution's words.<sup>10</sup> In the face of originalism or textualism, Justice Breyer looks for a flexible, more practical solution. While the term "Active Liberty" is more abstract than concrete, Justice Breyer, in an exclusive interview with the National Public Radio (NPR), says that 'Active Liberty' is the proper name used to identify his interpretational methodology. With this name, he wants to stress that "democracy works if — and only if — the average citizen participates."<sup>11</sup>

To understand Active Liberty - and the Justice who penned it - we must first understand what it is not.<sup>12</sup> It would be a mistake to see this book - as some of its critics have - as offering a "theory" about the Constitution. Breyer explicitly disclaims that he is setting forth a "theory."<sup>13</sup> In his review of Active Liberty, Paul Gerwitz from Yale Law School states that:

"His book is best seen as an activity of induction. Here Breyer is open about what the book represents: At a certain point in his judicial career, after deciding an enormous number of individual cases and writing a large number of opinions that explain conclusions in terms of legal doctrine and practical policy, he has looked for a "pattern" in his own work. The theme of democratic participation, then, is not only what he has found in his study of the framing of our Constitution, and in American history, but also a thematic pattern that he sees in

<sup>10</sup> "Supreme Court Justice Breyer on 'Active Liberty' : NPR." <http://www.npr.org/templates/story/story.php?storyId=4929668> (Accessed March 1, 2011). Pg 1

<sup>11</sup> "Supreme Court Justice Breyer on 'Active Liberty' : NPR." <http://www.npr.org/templates/story/story.php?storyId=4929668> (Accessed March 1, 2011).

<sup>12</sup> Gerwitz, P. (2006). LexisNexis® Academic: Document. *The Yale Law Journal*, 115(1675). Retrieved from

[http://www.lexisnexis.com.libproxy.albany.edu/lnacui2api/results/docview/docview.do?docLinkId=true&risb=21T11461513397&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T11461514200&cisb=22T11461513399&treeMax=true&treeWidth=0&selRCNodeID=5&nodeStateId=411en\\_US.1.2&docsInCategory=2&csi=7363&docNo=1](http://www.lexisnexis.com.libproxy.albany.edu/lnacui2api/results/docview/docview.do?docLinkId=true&risb=21T11461513397&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T11461514200&cisb=22T11461513399&treeMax=true&treeWidth=0&selRCNodeID=5&nodeStateId=411en_US.1.2&docsInCategory=2&csi=7363&docNo=1) . Pg. 1

<sup>13</sup> Ibid Pg. 1

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his own judicial decisions. This is something, one senses, that he had not seen until recently as such a significant and unifying thread in his own prior work. He is not providing a roadmap for deciding future cases. Breyer describes his ideas as "themes," an "approach," an "attitude," not a "theory," and emphasizes that they can "help" decide close cases, rather than dictate results without regard to other interpretative tools."<sup>14</sup>

Gerwitz also states that "The part of Active Liberty that may capture Breyer's behavior as a judge more fully is the book's other main theme, which is methodological: Judging is a pragmatic and purposeful activity in which interpretation and decision must always be attentive to the purposes of legal provisions, the multiplicity of factors involved in specific cases, and the practical consequences of judicial decisions, and should not focus exclusively on textual exegesis and uncovering original understandings."<sup>15</sup> It is important to mention that Justice Breyer does not downplay any consideration of text, history and precedent. He understands that "examining purposes and consequences does not displace the important-and more importantly-constraining role that text, history and precedent also should play."<sup>16</sup> He sees "purpose" and "consequences" as factors that should be considered along with other more important factors. He does not see an analysis of "purpose" and "consequences" as better or more fitting than an analysis of text, precedence or history. All of these factors are needed in order to determine whether a ruling should go in one way or another.

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<sup>14</sup> Ibid pg. 1

<sup>15</sup> GEWIRTZ, P. (2006). The Pragmatic Passion of Stephen Breyer. The Yale Law Journal, 115(1675). Retrieved from [http://www.lexisnexis.com.libproxy.albany.edu/lncui2api/results/docview/docview.do?docLinkInd=true&risb=21\\_T11461513397&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T11461514200&cisb=22\\_T11461513399&treeMax=true&treeWidth=0&selRCNodeID=5&nodeStateId=411en\\_US,1,2&docsInCategory=2&csi=7363&docNo=1](http://www.lexisnexis.com.libproxy.albany.edu/lncui2api/results/docview/docview.do?docLinkInd=true&risb=21_T11461513397&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T11461514200&cisb=22_T11461513399&treeMax=true&treeWidth=0&selRCNodeID=5&nodeStateId=411en_US,1,2&docsInCategory=2&csi=7363&docNo=1) Pg. 1

<sup>16</sup> Ibid pg 7

During an interview with Nina Totenburg from the National Public Radio Foundation, Justice Breyer argues that the founders used broad words in the Constitution precisely so that the Constitution would be adaptable over time. Justice Breyer believes that in interpreting the Constitution, there should be particular emphasis as to what the underlying purpose was-- fostering democratic participation to achieving democratic rule.<sup>17</sup> Totenburg asked Breyer whether his interpretational methodology favors majority rule. After all, Justice Breyer stresses that we consider the Constitution's democratic values when deciding on a case at hand. He recognizes the foreseeable conflict in his approach--that which pits the protection of individual basic rights against true democratic rule. Because of that consideration, he does not have a direct answer to this question. He does concede, however, that this conflict does make for difficult cases-- cases that his interpretational approach will not be able to solve in one way or another.

In instances where the subject matter of the case at hand is controversial and divisive, Breyer encourages judges to consider the "principles" or "purpose" behind the amendment, statute, or the part of the Constitution that is being considered. For instance, in many Affirmative Action cases, including *Grutter v. Bollinger*,<sup>18</sup> in which he voted in the affirmative, Justice Breyer sought to discover the purpose or principle behind the Equal Protection clause of the 14<sup>th</sup> amendment.<sup>19</sup> In these cases, the court's main task was to discover whether a school's Affirmative Action program was consistent with the Equal Protection Clause. During the interview with Nina Totenburg, Breyer stated that the Constitution was designed to set up institutions where citizens can participate in their government. To Justice Breyer, the purpose behind the Equal Protection Clause- "the notion that we want an inclusive society... where

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<sup>17</sup> Totenberg, Nina (2005, September 30). National Public Radio News. Washington. Interview.

<sup>18</sup> 539 U.S. 306 (2003)

<sup>19</sup> Breyer, Stephen G. 2005. *Active Liberty: interpreting our democratic Constitution*. Random House Digital, Inc. pg 75

everyone will feel part of a democratic society -played a role in reaching an outcome” in *Grutter*.<sup>20</sup> In a book review entitled *Justice Breyer’s Mandarin Liberty*, Ken I. Kersch gave us insight as to how Breyer derived at the purpose behind the Equal Protection Clause. In *Gratz v Bollinger* and *Grutter v Bollinger*, the meaning of the Equal Protection Clause, as applied, derived chiefly from the fact that: “[H]igh ranking retired officers and civilian leaders of the United States military assert that “based on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principal mission to provide national security.”<sup>21</sup> In connection to this, Breyer believes that “[E]ducation [is] pivotal to sustaining our political and cultural heritage [and plays] a fundamental role in maintaining the fabric of society. ”In reference to Affirmative Action, he believes that “[N]owhere is the importance of . . . openness more acute than in the context of higher education.”<sup>22</sup>

This interpretation lies in stark contrast to Justice Clarence Thomas’s Equal Protection Clause interpretation in *Grutter v. Bollinger*. Justice Thomas advocated for a color blind society, writing that “The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”<sup>23</sup> On the other hand, Breyer says that the

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<sup>20</sup> Breyer, Stephen G. 2005. “Supreme Court Justice Breyer on 'Active Liberty' by Nina Totenberg.” <http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=4929668&m=4929673> (Accessed March 4, 2011). Interview.

<sup>21</sup> A Review: Justice Breyer’s Mandarin Liberty. (2006). *University of Chicago Law Review*, 73, 759. Pg 794

<sup>22</sup> Ibid, 794

<sup>23</sup> 539 U.S. 306 at 353



Coming up with the “general purpose” of a Constitutional text or statute is by no means an easy task, especially when the ostensible “purpose” may not compliment the environmental sentiment of the times in which the law in question was written. Breyer was asked how he came up with the overall purpose of the Equal Protection Clause, considering the fact that the 14<sup>th</sup> amendment was created with a segregated gallery looking on; segregated schools in the District of Columbia; and a segregated lifestyle. He said that by reading about the framers of the 14<sup>th</sup> amendment, he saw two things. First, he saw that the framers realized they were writing a document that they wanted to live for a long time. That means that they knew that conditions would change; secondly, as far as the founders knew, conditions from the past up until their present generation *had* changed. In essence, the framers realized that the meaning of the Constitution, in order to increase its longevity, would have to adapt to the changing times. Thus, in solving Supreme Court cases, the Justice Breyer advises that other justices look for the “basic value that underlies the phrase [in question] and figure out how they value applies in today’s world.”

The main advantage that he sees in this approach over an originalist or textualist interpretation is one of transparency. Unlike the originalist who may argue for a decision because ‘that is the way it has been,’ the reasons behind his decisions provide a look into “consequences, the underlying value, history and the text at hand.” Justice Breyer says his approach is more transparent than others because in writing his opinion, he gives his reasons, some of which include consequences, history, and text. He thinks that it is much harder to do the same thing approach that limits any justice to “text and history alone.”<sup>29</sup>

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<sup>29</sup> Breyer, Stephen G. 2005. “Supreme Court Justice Breyer on 'Active Liberty' by Nina Totenberg.” <http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=4929668&m=4929673> (Accessed March 4, 2011). Interview



consistent with the basic purposes of certain Constitutional provisions. He sees the Constitution as “a single document designed to further certain basic general purposes as a whole.” In conjunction with determining whether he identifies consequences, we want to look if Justice Breyer identifies a “democratic ideal” that he uses to measure the consequences of his decision. The democratic ideal goes hand in hand with the purposes of the Constitutional or statutory text in question. The “democratic ideal” encompasses purpose, in addition to what Justice Breyer sees as the task of the Constitution. The task, Breyer believes, is to create a coherent framework for a certain kind of government. Described generally, that government is democratic; it avoids concentration of too much power in too few hands; it protects personal liberty; it insists that the law respect each individual equally; and it acts only upon the basis of the law itself. The true meaning behind these works will be contingent upon the case at hand. Because of this, we should look to see if Breyer defines a democratic ideal within the text of his opinions, dissents, or concurrences. He identifies consequences “as an important yardstick to measure a given interpretation’s faithfulness to democratic purposes.”<sup>31</sup> He says that a focus on purpose seeks to promote Active Liberty by insisting on interpretations, statutory as well as Constitutional, that are consistent with the people’s will. Because Justice Breyer’s theme that “courts should take greater account of the Constitution’s democratic nature” leads him to be a strong advocate and practitioner of “judicial modesty,” we should be on the lookout for opinions that favor the courts’ deference to the decisions of other more democratic institutions of our government, institutions, “that tend to involve fuller democratic participation by citizens.”<sup>32</sup>

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<sup>31</sup> Breyer, Stephen G. 2005. *Active Liberty: interpreting our democratic Constitution*. Random House Digital, Inc. pg 115

<sup>32</sup> Gewirtz, P. (2006). The Pragmatic Passion of Stephen Breyer. *The Yale Law Journal*, 115(1675). Retrieved from [http://www.lexisnexis.com.libproxy.albany.edu/lncui2api/results/docview/docview.do?docLinkInd=true&risb=21\\_T11461513397&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUriKey=29\\_T11461514200&cisb=22\\_T11461513399&treeMax=true&treeWidth=0&selRCNodeID=5&nodeStateId=411en\\_US,1,2&docsInCategory=2&csi=7363&docNo=1](http://www.lexisnexis.com.libproxy.albany.edu/lncui2api/results/docview/docview.do?docLinkInd=true&risb=21_T11461513397&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUriKey=29_T11461514200&cisb=22_T11461513399&treeMax=true&treeWidth=0&selRCNodeID=5&nodeStateId=411en_US,1,2&docsInCategory=2&csi=7363&docNo=1) Pg. 1

We must not assume that this is an exhaustive list of the factors needed to determine whether the Active Liberty approach is being used in a particular case. From Justice Breyer’s interview with the National Public Radio Foundation, I conjecture that Justice Breyer may not use all the factors that make up for Active Liberty in every case. He may use every factor that I listed, or he may use one or two. No matter what he does, we must look to see if he identifies the purpose of the founders or the consequences of his or/and the Court’s decisions, factors that he wants us to pay attention to. It is then when we will see if his rhetoric off the court is consistent with his interpretational approach on the court

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**Affirmative Action: What Breyer thinks, what he may look out for**

In Affirmative Action cases, the Justices look to see if a school’s Affirmative Action program is constant with the Equal Protection Clause.<sup>33</sup> The central question of many Affirmative Action cases is whether the school’s way of achieving diversity or remedying effects of a racist past is in line with the Equal Protection clause—a clause that forbids any state to “deny any person...the equal protection of the laws.”<sup>34</sup> In *Active Liberty*, Justice Breyer states that “the purpose of the Equal Protection Clause grows out of a history that includes this nation’s efforts to end slavery and the segregated society that followed. It consequently demands laws that equally respect each individual; it forbids laws based on race when those laws reflect a lack of equivalent respect for members of the disfavored race; but it does not similarly disfavor race-based laws in other circumstances.”<sup>35</sup> He does not see invidious discrimination and positive

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<sup>33</sup> Breyer, S. G. (2005). *Active Liberty: interpreting our democratic Constitution*. Random House Digital, Inc. Pg. 75

<sup>34</sup> *Ibid* pg 76

<sup>35</sup> *Ibid* pg 76



Michigan Law School. She was later denied admission despite her 3.8 undergraduate GPA and 161 LSAT score. The University of Michigan Law School, one of the Nation's top law schools, followed an official admissions policy that sought to achieve student body diversity through compliance with *Regents of Univ. of Cal. v. Bakke*, (438 U. S. 265). The policy did not define diversity solely in terms of racial and ethnic status and did not restrict the types of diversity contributions eligible for "substantial weight," but it did reaffirm the Law School's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in meaningful numbers. By enrolling a "critical mass" of underrepresented minority students, the policy sought to ensure their ability to contribute to the Law School's character and to the legal profession.<sup>40</sup>

When the Law School denied admission to petitioner Grutter, she filed this suit, alleging that respondents had discriminated against her on the basis of race in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U. S. C. § 1981; that she was rejected because the Law School used race as a "predominant" factor, giving applicants belonging to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups; and that respondents had no compelling interest to justify that use of race.<sup>41</sup>

In *Active Liberty*, Breyer says that this case is an example of when a reference to Active Liberty can "help a court choose between competing interpretations of Constitutional provision that, on their face, seem based upon other values."<sup>42</sup> When deciding this case, Breyer, along with the majority of the court, found Michigan's admissions policy "compelling." Because the school

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<sup>40</sup> Grutter v. Bollinger; [539 U.S. 306 \(2003\)](#) (summary)

<sup>41</sup> Grutter v. Bollinger; [539 U.S. 306 \(2003\)](#) (summary)

<sup>42</sup> Ibid pg 84

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considered each application individually, the court believed that the school's affirmative action program was "narrowly tailored" to achieve diversity.<sup>43</sup>

But we must ask whether he looks for purposes and consequences when analyzing *other* Affirmative Action cases. Does he discuss the purposes of an act or law in question? Does he discuss the consequences of the Supreme Court's ruling? Does he line up purpose and consequences with the "democratic ideal" that the founder sought to achieve when they constructed the Equal Protection Clause? Analyzing all of the Supreme Court's Affirmative Action cases will help us answer these questions.

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### **What are Conservative and Liberal Viewpoints of Affirmative Action?**

Before we are able to assess whether Breyer's Supreme Court rationales are used a means to a liberal or conservative outcome, we must see what the liberal and conservative viewpoints are in reference Affirmative Action. The terms, conservative and liberal are very difficult to define, for these are terms of relativity. For example, in the Yale Law Journal, Cross and Tiller assumed that "in general, Democratic [federal-appellate-court] appointees *are more* liberal and Republicans more conservative in policy orientation." In the American Political Science Review, Gerber and Park state that they "made the standard assumption that Republican judges tend to *reach more* conservative decisions than do Democratic judges." These articles, along with many others, suggest that the definitions for liberal and conservative are difficult to acquire. With the vast majority of scholarly articles describing conservative and liberal as terms relative of each other, it is difficult to accurately describe what a liberal or conservative is. I can say, however what a conservative is more likely to believe in reference to a particular subject matter, as well as

<sup>43</sup>, S. G. (2005). Active Liberty: interpreting our democratic Constitution. Random House Digital, Inc. Pg. 78

what a liberal is more likely to believe in reference to a particular subject matter. Looking at various articles in which Affirmative Action is discussed, I look at some prominent conservative and liberal scholar's viewpoints on this issue. I also take into account research that offers explicit definitions of the 'conservative' and 'liberal' viewpoint of Affirmative Action. These works help me gain a better, widely agreeable, and cohesive description of the viewpoints around this subject matter.

It is understood that no political party is a monolithic group. Therefore, I will try to avoid resorting to stereotypical notions of how any conservative or any liberal may feel about Affirmative Action. But within American politics, it must be conceded that viewpoints about the most controversial and divisive issues are divided across political party groups and ideological lines. According to Pinello, Republicans are more likely to be conservative and democrats are more likely to be liberal.<sup>44</sup> Because these intangible but identifiable divide lines exist, I use the "typical" viewpoints of group ideologies to determine whether Justice Breyer embraces a liberal or conservative point of view, at least within the context of Affirmative Action and free speech.

Two journal articles help us figure out what a 'typical' conservative viewpoint of Affirmative Action is. Culling from the works of Robert M. Howard and Jeffrey A. Segal, we are able to see that while conservatives do not hesitate to declare unconstitutional laws of which they disapproved such as state laws limiting business interests, liberals strike laws that infringe on individual liberties.<sup>45</sup> This argument is consistent to that which is given in the article entitled *Racism, Conservatism, Affirmative Action, and Intellectual Sophistication: A Matter of Principled Conservatism or Group Dominance*, Jim Sidanius, Felicia Pratto and Lawrence Bobo

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<sup>44</sup> Pinello, D. R. (1999). Linking Party to Judicial Ideology in American Courts: A Meta-Analysis. *The Justice System Journal*, 20(3), 219-54.

<sup>45</sup> Howard, Robert M., and Jeffrey A. Segal. 2004. "A Preference for Deference? The Supreme Court and Judicial Review." *Political Research Quarterly* 57(1): 131 -143. (Accessed March 31, 2011). Pg 133.

state that Conservatives generally voice opposition to civil rights legislation on the grounds that, to avoid costly litigation associated with Affirmative Action, employers would inevitably resort to hiring quotas for women and minorities. Conservatives generally reject suggestions that their opposition to civil rights legislation is motivated by racism. Instead they maintain that this opposition is strictly driven by a principled consideration of fairness, equity, and the goal of establishing a truly color-blind society.<sup>46</sup> They also state that a number of neoconservative intellectuals have even suggested that the major antidote to racial discrimination is more conservatism and more, not less, free-market capitalism. To strengthen their argument that conservatives view Affirmative Action in this way, Sidanius Pratto and Bobo state that many studies have shown a connection between political conservatism and opposition to policies such as Affirmative Action.

The American Prospect, an “authoritative magazine of liberal ideas, committed to a just society, an enriched democracy, and effective liberal politics,”<sup>47</sup> gives us insight on the liberal views of Affirmative Action. Looking at the works from contributors like Randall Kennedy, Ronald Brownstein, Cornel West, Kenneth S. Tollett and Paul Starr, we see that liberals view Affirmative Action as necessary to bridge the gap between Blacks and Whites in America. While there are mixed views about how to carry out Affirmative Action, many liberals view Affirmative Action as not only sufficient, but necessary to achieve equality in America.<sup>48</sup> In an

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<sup>46</sup> Sidanius, Jim, Felicia Pratto, and Lawrence Bobo. 1996. “Racism, Conservatism, Affirmative Action, and Intellectual Sophistication: A Matter of Principled Conservatism or Group Dominance?” *Journal of Personality and Social Psychology* 70(3): 476-490. (Accessed March 31, 2011). Pg 476

<sup>47</sup> “About The American Prospect-Mission.” [http://prospect.org/cs/about\\_tap/our\\_mission](http://prospect.org/cs/about_tap/our_mission) (Accessed March 31, 2011).

<sup>48</sup> Randall Kennedy, Ronald Brownstein and Cornel West and Kenneth S. Tollett, , and , Paul Starr. “Race, Liberalism, and Affirmative Action.” [http://prospect.org/cs/articles?article=race\\_liberalism\\_and\\_affirmative\\_action](http://prospect.org/cs/articles?article=race_liberalism_and_affirmative_action) (Accessed March 31, 2011).

article by Randall Kennedy, he views Affirmative Action to be within the lines of liberal thinking of an inclusive society with full opportunity for all.<sup>49</sup>

In an article entitled, *Diversity Perversity* by Wendy Kaminer, she states that “Liberals generally promote Affirmative Action as a means of achieving diversity, whereas conservatives, if forced to accept Affirmative Action at all, would only allow it to be used remedially.” In other words, to conservatives “an institution that hasn't discriminated against racial minorities in the past may not discriminate in favor of them in the present, and institutions that are guilty of prior discrimination may, in theory, only employ racial preferences remedially, until the prior offense is cured.”<sup>50</sup>

To sum up, conservatives generally do not view Affirmative Action as the most proper way to achieve equality in America. Many conservatives believe that adopting “colorblind” policies will be more efficient and more equitable than race conscious Affirmative Action policies. Liberals believe that many Affirmative Action policies are needed in order to achieve true equality in America. They believe that without Affirmative Action in place, African Americans and other minorities would not achieve the necessary gains to ensure equality in America. The idea of equality in American is wrought with different ideals and beliefs, so there is no real way of knowing what each ideological group views as true equality. Notwithstanding, each party does aspire to achieve a certain form of equality in America. But, as Randall Kennedy stated, they believe that this equality should be achieved through entirely different ways.

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<sup>49</sup> Kennedy, R. (n.d.). The Enduring Relevance of Affirmative Action. Retrieved May 9, 2011, from [http://prospect.org/cs/articles?article=the\\_enduring\\_relevance\\_of\\_affirmative\\_action](http://prospect.org/cs/articles?article=the_enduring_relevance_of_affirmative_action)

<sup>50</sup> Wendy Kaminer. 2002. “On the Contrary:Diversity Perversity.” [http://prospect.org/cs/articles?article=on\\_the\\_contrary\\_072902](http://prospect.org/cs/articles?article=on_the_contrary_072902) (Accessed March 31, 2011).

### Does He Actually Use the Active Liberty Approach?

Writing Supreme Court opinions gives the Justices the chance to justify their rulings.

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Writing dissents similarly give Justices the chance to justify their rulings, but this time, they speak on why the Supreme Court should not have ruled in the way it did. From 1994 to 2011, there have been very, very few Supreme Court cases that centered on affirmative action. Justice Breyer writes a dissent, concurrence, or opinion in even fewer cases. Out of a total of five cases that I have found, Justice Breyer writes an opinion, concurrence or dissent in only three cases. One of the five cases features a per curium opinion,<sup>51</sup> while another case features a dissent from Justice Breyer without written reasoning to explain his decision.<sup>52</sup> From the three cases in which Justice Breyer does write, he uses one case in his book as an example of what his approach may be when dealing with affirmative action cases before the Supreme Court.<sup>53</sup>

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To avoid circular and therefore fallacious reasoning, I will avoid analyzing *Grutter v. Bollinger*- the example case that Justice Breyer uses in his book- to see if Justice Breyer uses the Active Liberty approach. I made this decision because Justice Breyer uses this case as an example to show how the Active Liberty approach may play out when applied to real and concrete cases. Therefore, the cases that are left to analyze include the 2003 case of *Gratz. v. Bollinger* – (539 U.S. 244) and the most recent Affirmative Action Supreme Court case entitled *Parents Involved in Community Schools v. Seattle School District No. 1* (551 U.S. 701 (2007)). For this part of the paper, I will do a few things. First, I will summarize each case. Then, by looking at which Active Liberty factors are made salient in the Justice Breyer's concurrences, opinions or dissents, I will determine whether Justice Breyer uses the Active Liberty approach in these cases. When analyzing at the cases, I will be on the lookout to see: (1)if Justice Breyer

<sup>51</sup> Texas v. Lesage , 528 U.S. 18 (1999)

<sup>52</sup> Adarand Constructors, Inc. v. Peña, Secretary of Transportation, Et Al - 515 U.S. 200 (1995)

<sup>53</sup> Grutter v. Bollinger Et Al - 539 U.S. 306 (2003)

analyzes the purposes of the founders or framers when looking at a constitutional text or phrase; (2) if Justice Breyer analyzes the purposes of the law(s) or policy in question; (3) if Justice Breyer discusses the perceived consequences of the decision that the Supreme Court made; (4) if Justice Breyer points out a democratic ideal or what he sees as the task of the Constitution as a whole. With this we must also determine if he uses this ideal to measure the consequences of the decision; and (5) if Justice Breyer advocates for the practice of judicial modesty.

**Gratz et al. v. Bollinger (539 U.S. 244) (2003)**

This case involves Affirmative Action at the university level. The University of Michigan's undergraduate admissions policy was based on a point system that automatically granted 20 points to applicants from underrepresented minority groups. Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Jennifer Gratz applied to the University of Michigan's College of Literature, Science and the Arts with an adjusted GPA of 3.8 and ACT score of 25. Patrick Hamacher applied to the University with an adjusted GPA of 3.0, and an ACT score of 28. Both petitioners were Caucasian. Both were denied admission.<sup>54</sup> Both applicants formed a class-action equal protection suit against the University of Michigan and University officials for alleged racial discrimination.

The petitioners argued that there were "violations and threatened violations of the rights of the plaintiffs and the class they represent to equal protection of the laws under the Fourteenth Amendment." The court was left to determine whether "the University of Michigan's use of

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<sup>54</sup> Gratz v. Bollinger, U.S. Supreme Court Case Summary & Oral Argument. (n.d.). Retrieved April 2, 2011, from [http://www.oyez.org/cases/2000-2009/2002/2002\\_02\\_516](http://www.oyez.org/cases/2000-2009/2002/2002_02_516)

racial preferences in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 and, and 42 U.S.C.S. § 1981.”<sup>55</sup> They also had to determine whether to analyze the University of Michigan’s admissions policy under a strict scrutiny test. In other words, the Supreme Court had to decide whether they would evaluate the University of Michigan’s admissions policy to see if it was “narrowly tailored” to serve a “compelling interest.”<sup>56</sup>

The Supreme Court, in a 5-4 decision, ruled in favor of the petitioners. On the issue of scrutiny, the Court stated that it has been established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." They also stated that this “standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification.”<sup>57</sup> They found that the University's policy, which automatically distributed 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, was not narrowly tailored to achieve the interest in educational diversity that the University claims as a justification of their program.<sup>58</sup> For the Court, the policy did not provide individualized consideration. The policy was unconstitutional because the “automatic distribution of 20 points had the effect of making “the factor of race . . . decisive” for virtually every minimally qualified underrepresented minority applicant.”<sup>59</sup> In addition to ruling that the policy violated the Equal Protection Clause of the

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<sup>55</sup> Gratz Et Al. v. Bollinger Et Al - 539 U.S. 244 at 250

<sup>56</sup> In the context of an equal protection claim, to withstand strict scrutiny analysis, a respondent must demonstrate that the use of a suspect classification in its program employs narrowly tailored measures that further compelling governmental interests. Because racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification, the court's review of whether such requirements have been met must entail "a most searching examination." (Gratz Et Al. v. Bollinger Et Al - 539 U.S. 244; Lexis Nexis Headnotes)

<sup>57</sup> Gratz Et Al. v. Bollinger Et Al - 539 U.S. 244 at 270; the court cited *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 and quoted *Richmond v. J. A. Croson Co.*, 488 U.S. 469

<sup>58</sup> Gratz Et Al. v. Bollinger Et Al - 539 U.S. 244 at 270

<sup>59</sup> Gratz Et Al. v. Bollinger Et Al - 539 U.S. 244 at 272

Fourteenth Amendment, they ruled that the policy also violated Title VI of the Civil Rights Act of 1964 and, and 42 U.S.C.S. § 1981.

For this case, Justice Breyer concurred in part and dissented in part. He wrote very, very little to justify his standing in the case. At most, he concurred with Justice O'Connor to express the view that unlike the law school admissions policy the Court upheld in *Grutter v. Bollinger*, the procedures employed by the University of Michigan's Office of Undergraduate Admissions did not provide for a meaningful individualized review of applicants.<sup>60</sup> Unlike The University of Michigan School of Law, which considered "the various diversity qualifications of each applicant, including race, on a case-by-case basis," Justice O'Connor argued that the undergraduate University relied on the selection index to assign every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. Justice O'Connor stated that the University's commitment to diversity did not justify the selection index, by setting up automatic, predetermined point allocations for the soft variables. This policy ensured that the diversity contributions of applicants could not be individually assessed.

In his terse concurrence, Justice Breyer took time to talk about the importance of deferring important decisions to more democratic institutions of government. He concurred with the Court's judgment but not with the Court's opinion. He joined with one part of Justice Ginsburg's dissent to express the view that in implementing the Constitution's equality instruction, government decision makers could properly distinguish between policies of inclusion and exclusion, for the former were more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally.<sup>61</sup> He joined Justice Ginsburg's dissent

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<sup>60</sup>Gratz Et Al. v. Bollinger Et Al - 539 U.S. 244 at 277

<sup>61</sup> Gratz Et Al. v. Bollinger Et Al - 539 U.S. 244 at 282

also to express that the Equal Protection Clause was color-blind with respect to a classification that denied a benefit, caused harm, or imposed a burden on the basis of race, but color-conscious with respect to preventing the perpetuation of discrimination, and undoing the effects of past discrimination.<sup>62</sup>

In this, we see an important factor of the Active Liberty approach play out. Even though this concurring opinion is less than five sentences long, we can see Justice Breyer advocate for judicial modesty. He opines in favor of the courts' deference to the decisions of other more democratic branches of our government. He believes that governmental institutions are competent enough to distinguish between malignant and benign racial policies. While he does not believe that Michigan's policy is constitutional, he still believes that the job of determining which affirmative action plans are needed in order to enhance diversity belongs to societal institutions and to the elected branches of our government, not the justices.<sup>63</sup>

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Earlier I stated that when looking to see if Justice Breyer uses the Active Liberty approach in his opinions, we need to determine whether Justice Breyer discusses the consequences of the decisions that he and/or the Supreme Court may make, in addition to the purposes of an act or law in question. Consequences and purposes should be considered the factors that we look out for because Justice Breyer, in his interviews, speeches and writings, emphasizes the importance of considering purpose and consequences (along with text, history and precedent) before judicial modesty and democratic ideal when determining Supreme Court rulings. In *Gratz*, because of the brevity of Justice Breyer's written concurrence, there is little material with which to determine whether Justice Breyer uses the Active Liberty approach as a means to justify his opinion. After analyzing this case, I can say that there is no discussion of the

<sup>62</sup> *Gratz Et Al. v. Bollinger Et Al* - 539 U.S. 244 at 301

<sup>63</sup> Breyer, Stephen G. 2005. *Active Liberty: interpreting our democratic Constitution*. Random House, Inc. pg 82

perceived consequences that may come about from the enforcement of his opinion or the Supreme Court ruling. There is no discussion of the purposes of the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, or 42 U.S.C.S. § 1981. Justice Breyer does not discuss the purposes behind the University of Michigan's admissions policy. There is no discussion of a democratic ideal or what Justice Breyer sees as the task of the Constitution as a whole. At most, we see that Justice Breyer, when faced with this issue, favors a certain degree of deference to more democratic branches of government. Because we see only one of five factors needed to determine whether Breyer uses the Active Liberty approach, we can determine that he barely uses it in this case at hand, if he uses it at all.

Because this case was decided right after the similar case, *Grutter v. Bollinger* (539 U.S. 306), one may assume that Justice Breyer might have chosen to elaborate his views in one of the cases. But in *Grutter*, Justice Breyer does not write an opinion, concurrence or a dissent. As a result, between these two affirmative action cases, there is no clear or extensive set of reasoning laid out by Justice Breyer that would help to explain why he decided either case the way he did.

### **Does Justice Breyer Use His Reasoning as a Means to Liberal or Conservative Outcome?**

If it was proven that Justice Breyer used the Active Liberty Approach in a case, I agreed to discuss whether he used the approach as a means to a conservative or liberal outcome. Because it has not been proven that Justice Breyer does use Active Liberty in this case, we need not go further in order to see whether the rationale in this case is used as a means to achieve a conservative or liberal outcome.

**Commented [JN35]:** But does he refer back to his opinion in *Gratz*? Because these cases were companion cases, he may have chosen to elaborate on his views in only one of the cases.

Justice Breyer's opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* (551 U.S. 701 (2007)) gives us a large amount of material to work with. In this case, he writes at length to say why the Supreme Court ruling is wrong. This is the perfect case to analyze for two reasons: 1) unlike the cases of *Grutter* and *Gratz*, this case was decided after *Active Liberty* was written. This gives us a better opportunity to assess whether Justice Breyer's uses the *Active Liberty* approach in this case; and 2) unlike in the cases of *Grutter* and *Gratz*, Breyer writes a lengthy, analytical and extensive dissent- plenty of material with which to determine whether Justice Breyer uses the *Active Liberty* approach as a means to justify his reasoning.

**Parents Involved in Community Schools v. Seattle School District No. 1 551 U.S. 701 (2007)**

This case involves Affirmative Action at the primary to secondary school level. The case centers on diversity initiative affirmative action policies of the school districts of Seattle, Washington and Jefferson County, Kentucky. Both school districts adopted plans whereby, after place of residence and availability of space were considered, school assignments were made on the basis of race to ensure that schools were racially balanced.<sup>64</sup> The Seattle district, which has never operated legally segregated schools or been subject to court-ordered desegregation, classified children as White or non-White. They used the racial classifications to allocate slots in particular high schools. Since certain schools often became oversubscribed when too many students chose them as their first choice, the Seattle district used a system of tiebreakers to decide which students would be admitted to the popular schools. If the racial demographics of any school's student body deviated by more than a predetermined number of percentage points

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<sup>64</sup> *Parents Involved in Community Schools v. Seattle School District No. 1* 551 U.S. 701 (Lexis Nexis overview)

from those of Seattle's total student population (approximately 40% White and 60% non- White), a racial tiebreaker went into effect. At a particular school, either Whites or non-Whites could be favored for admission depending on which race would bring the racial balance closer to the goal or maintaining racial diversity.<sup>65</sup> The Jefferson County, Kentucky district was subject to a desegregation decree until 2000, when the District Court dissolved the decree after finding that the district had “eliminated” the vestiges of prior segregation to the greatest extent practicable. In 2001, the district classified students as “Black” or “other” in order to make certain elementary school assignments and to rule on transfer requests.<sup>66</sup> The plan required all non-magnet schools to maintain a minimum Black enrollment of 15 percent, and a maximum Black enrollment of 50 percent.<sup>67</sup>

The petitioners, a parents' association and the parent of a student, brought actions against the public school districts, challenging the districts' plans, which relied upon racial classifications in making school assignments. The U.S. Courts of Appeals for the Sixth and Ninth Circuits upheld the plans,<sup>68</sup> finding that they survived strict scrutiny on the federal constitutional claim because they were narrowly tailored to serve a compelling governmental interest.

In this case, the questions before the Supreme Court were: (1) Since the current members' injuries are not imminent, do the petitions have standing in this case?; (2) What level of scrutiny should be given to a case like this in which race plays a determining factor in a student's matriculation at a certain school?; (3) Do the policies in question violate the Equal Protection Clause?

<sup>65</sup> Parents Involved in Community Schools v. Seattle School District No. 1 | The Oyez Project at IIT Chicago-Kent College of Law. (n.d.). Retrieved April 6, 2011, from [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_908/](http://www.oyez.org/cases/2000-2009/2006/2006_05_908/)

<sup>66</sup> Parents Involved in Community Schools v. Seattle School District No. 1 551 U.S. 701 (2007) (syllabus)

<sup>67</sup> Parents Involved in Community Schools v. Seattle School District No. 1 551 U.S. 701 at 716

<sup>68</sup> Parents Involved in Community Schools v. Seattle School District No. 1 551 U.S. 701 (2007) (Lexis Nexis procedural posture)

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In a 5-4 decision with a 4 justice plurality,<sup>69</sup> the judgments upholding the districts' school assignment plans based on race were reversed, and the cases were remanded for further proceedings.<sup>70</sup> Chief Justice Roberts, writing the opinion for the Court, stated that the Court had jurisdiction and the petitioners had standing. To the Court, the group's members had children in all levels of the district's schools, and the complaint sought declaratory and injunctive relief on behalf of members who's elementary and middle school children may be denied admission to the high schools of their choice in the future. The fact that those children may not be denied such admission based on their race because of undersubscription or oversubscription that benefits them did not eliminate the injury claimed. The Parents Involved coalition also asserted an interest in not being forced to compete in a race-based system that might prejudice its members' children, an actionable form of injury under the Equal Protection Clause.<sup>71</sup>

As to the level of scrutiny, the Supreme Court ruled that “when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”<sup>72</sup> The Court, citing *Gratz v. Bollinger*, justified the use of this level of scrutiny by stating that “racial classifications [were] simply too pernicious to permit any but the most exact connection between justification and classification.”<sup>73</sup> In order to satisfy this standard of review, the Court demanded that “the school districts demonstrate that the use of individual racial classifications in the assignment plans under review were “narrowly tailored” to achieve a “compelling” government interest.” In past cases where racial classifications in the educational context were considered, the Court recognized two interests that were particularly

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<sup>69</sup> Roberts joined by Scalia, Thomas, Alito

<sup>70</sup> *Parents Involved in Community Schools v. Seattle School District No. 1* 551 U.S. 701 (2007) (Lexis Nexis Outcome)

<sup>71</sup> *Parents Involved in Community Schools v. Seattle School District No. 1* 551 U.S. 701 at 719

<sup>72</sup> 551 U.S. 701 at 720

<sup>73</sup> 551 U.S. 701 at 720

compelling. The first involved an interest to remedy the effects of past intentional discrimination (Freeman v. Pitts, 503 U.S. 467 (1992)). The court argued that this compelling interest did not apply to Seattle because they did not show that they were ever segregated by law. Also, they were not subject to court order desegregation decrees.<sup>74</sup> This compelling interest also did not apply to Jefferson County School district because in 2000, the District Court found that the Jefferson County had “eliminated the vestiges associated with the former policy of segregation and its pernicious effects,” and thus had achieved “unitary” status.<sup>75</sup> The second governmental interest that was recognized as compelling for the purposes of strict scrutiny was the interest in diversity in *higher* education as upheld in *Grutter*. This was also argued not to apply to the case at hand. For the Court, the main difference between this case and *Grutter* was that, besides dealing with affirmative action at the secondary school level, the policies in question focused on race while the law school in *Grutter* considered race along with "all factors that may contribute to student body diversity."<sup>76</sup> They said that this compelling interest did not apply to this case because, unlike the case at hand, the admissions program at issue in *Grutter* focused on each applicant as an individual and not simply as a member of a particular racial group. In *Grutter*, achieving diversity was contingent upon finding a plethora of diverse individuals who could make the law school experience more worthwhile. In *Grutter*, the use of racial classifications was seen as a “broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional."<sup>77</sup>

The Court looked at each district’s justifications for their plan. To the Court, “each school district argue[d] that educational and broader socialization benefits flow from a racially

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<sup>74</sup> 551 U.S. 701 at 720

<sup>75</sup> 551 U.S. 701 at 721

<sup>76</sup> 551 U.S. 701 at 722

<sup>77</sup>Parents Involved in Community Schools v. Seattle School District No. 1 551 U.S. 701 at 723

diverse learning environment, and each contends that because the diversity they seek is racial diversity--not the broader diversity at issue in *Grutter*--it makes sense to promote that interest directly by relying on race alone."<sup>78</sup> Despite the justifications given on the part of the school districts, the Court found that "the plans [were] tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."<sup>79</sup> Justice Roberts argued that "in design and operation, the plans [were] directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."<sup>80</sup> They did not see the plans as narrowly tailored. The minimal effect these classifications had on student assignments suggests that other means would be effective."<sup>81</sup> They mentioned that there were better, race neutral ways of achieving the school districts' goals. In the end, they felt that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>82</sup>

In order to show that the school assignment plans were constitutional, Justice Breyer wrote "at an exceptional length."<sup>83</sup> For Justice Breyer, one consequence of the Court's decision was that it undermined "*Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality."<sup>84</sup> In his opinion, the Seattle district should not have been restricted from initiating their desegregation plans just because they were not proven to have a history of segregation. Justice Breyer argued that the constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so. To

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<sup>78</sup> 551 U.S. 701 at 726

<sup>79</sup> 551 U.S. 701 at 726

<sup>80</sup> 551 U.S. 701 at 726

<sup>81</sup> 551 U.S. 701 at 733

<sup>82</sup> 551 U.S. 701 at 748

<sup>83</sup> 551 U.S. 701 at 863

<sup>84</sup> 551 U.S. 701 at 804

Justice Breyer, “a court finding of *de jure* segregation cannot be the crucial variable” used to determine whether a state is permitted to initiate desegregation efforts.<sup>85</sup>

Justice Breyer addressed the Court’s effort to distinguish this case from *Grutter* because the latter case arose in “the context of higher education.” He argued that this was a not meaningful distinction. He did not see why the court should make salient the fact that the school did not examine the merits of applications “individual[ly].” By looking at the context of the law or policies in question, Justice Breyer argued that the plans did not involve admission by merit; a child’s academic, artistic, and athletic “merits” were not at all relevant to the child’s placement. To Justice Breyer, the school districts’ plans were not affirmative action plans in the traditional sense of the word. “Hence, “individualized scrutiny” was simply beside the point.”<sup>86</sup>

Justice Breyer essentially made three important points in his dissent. First, he argued that the distinction between *de jure* segregation (segregation as mandated by law) and *de facto* segregation (caused, e.g., by housing patterns or generalized societal discrimination) was meaningless in the present context, thereby dooming the plurality’s endeavor to find support for its views in that distinction. Next, he argued that the constitution was not colorblind. Finally, he said that the school districts’ plans served “compelling interests” and were “narrowly tailored” on any reasonable definition of those terms. Therefore, Justice Breyer argued that the decision made by the plurality could not be justified under the framers’ true understanding of the Equal Protection Clause

In analyzing this case, Justice Breyer took a close look at the facts before him. He provided us with a history of Seattle and Jefferson County in an effort to contextualize the decision he made. To Justice Breyer, there was an insignificant difference between *de jure* (legal)

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<sup>85</sup> 551 U.S. 701 at 821

<sup>86</sup> 551 U.S. 701 at 855

segregation and de facto (not legally mandated; social) segregation. A state need not prove that it was legally segregated in order to determine that it had been segregated in fact. Notwithstanding any law on or off the books, Justice Breyer argued that “in both Seattle and Jefferson County, the local school districts began with schools that were highly segregated in fact.”<sup>87</sup>

As a result, “in both cities, the school boards adopted plans designed to achieve integration by bringing about more racially diverse schools.” The school boards constantly modified their plan because of the threat of “White-flight,” “hostility to busing, and the desirability of introducing greater student choice. While these schools have worked to achieve these goals without consideration of race-based criteria, over time, it proved a futile effort because “any other approach would freeze the status quo that is the very target of all desegregation processes.”<sup>88</sup>

Justice Breyer cited the history of Seattle and Jefferson County to suggest that the plans each school board used as a means to achieve racial diversity was constitutional. To Justice Breyer, the policies were constitutional because they were consistent with the founders’ understanding of the Equal Protection Clause’s dual purpose. One of the purposes or objectives of “those who wrote the Equal Protection Clause” was to forbid practices that lead to racial exclusion.” This involved any legislation that was meant “namely to keep the races apart.”<sup>89</sup> Citing the *Slaughterhouse Cases* (83 U.S. 36, (1873)) Justice Breyer argued that another purpose of the clause was “to bring into American society as full members those whom the Nation had previously held in slavery.”<sup>90</sup> The founders, with these basic purposes in mind, would

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<sup>87</sup> 551 U.S. 701 at 806

<sup>88</sup> 551 U.S. 701 at 825 (“[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated . . . all the civil rights that the superior race enjoy”).

<sup>89</sup> 551 U.S. 701 at 829

<sup>90</sup> 551 U.S. 701 at 829

have understood the legal and practical difference between the use of race-conscious criteria in defiance of those purposes, namely to keep the races apart, and the use of race-conscious criteria to further those purposes, namely to bring the races together.<sup>91</sup> In the case at hand, Justice Breyer believed that the school boards were using race conscious criteria as a means to “bring the races together” and to increase inclusiveness. Therefore, the actions on the part of the school boards were much in line with the framers’ purposes for writing the Equal Protection Clause.

Because it may be hard to ascertain whether, *prima facie*, a race conscious law is inclusive or exclusive in nature, Justice Breyer suggested looking at myriad factors, including the school boards’ intent. This, he argued, allowed the Court the chance to distinguish good from harmful governmental uses of racial criteria. To Justice Breyer, the plans were made “to bring about greater racial integration of public schools.”<sup>92</sup> Because “both districts faced problems that reflected initial periods of severe racial segregation,” the school plans reflected valiant efforts to make for a racially inclusive society. The plans were also made for “educational and democratic reasons.” The schools initiated these plans in order to overcome the adverse educational effects produced by and associated with highly segregated schools.<sup>93</sup> They “treated the ideal of an integrated system as much more than a legal obligation—they considered it a positive, desirable policy and an essential element of any well-rounded public school education.”<sup>94</sup> These intents were determined by Justice Breyer to be consistent with the founders’ view of the Equal Protection Clause’s purpose.

Unlike the plurality who felt that the districts plans were not justified because of the way they use race, Justice Breyer argued that “a longstanding and unbroken line of legal authority

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<sup>91</sup> 551 U.S. 701 at 829

<sup>92</sup> 551 U.S. 701 at 829

<sup>93</sup> 551 U.S. 701 at 839

<sup>94</sup> 551 U.S. 701 at 856

tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it.”<sup>95</sup> He cited *North Carolina Bd. of Ed. v. Swann* to say that “school authorities were traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to White students reflecting the proportion for the district as a whole.” With this said, schools were given wide discretion when determining the best way to achieve racial diversity within their institutions. In the end, Justice Breyer stated that voluntary programs of local school authorities to alleviate de facto segregation and racial imbalance in the schools were not constitutionally forbidden. He therefore rejected the argument that “a race-conscious plan is permissible only when there has been a judicial finding of *de jure* segregation.”<sup>96</sup>

Next, he rejected the “colorblind” approach, which basically stated that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” While the plurality may believe that any form of racial distinction could amount to racial discrimination Justice Breyer believed that no case “repudiated this constitutional asymmetry between that which seeks to exclude and that which seeks to include members of minority races.”<sup>97</sup> Although the Constitution almost always forbids the former, Justice Breyer found that it was significantly more lenient in respect to the latter.<sup>98</sup> With the “colorblind” approach, Breyer argued that the plurality would deprive schools of at least one tool that some districts now consider vital--the

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<sup>95</sup> 551 U.S. 701 at 823

<sup>96</sup> 551 U.S. 701 at 828

<sup>97</sup> 551 U.S. 701 at 742

<sup>98</sup> 551 U.S. 701 at 830

limited use of broad race-conscious student population ranges. This is problematic especially since “de facto resegregation is on the rise.”<sup>99</sup>

As to the plurality’s argument for applying strict scrutiny, Justice Breyer felt that “[s]trict scrutiny did not trea[t] dissimilar race-based decisions as though they were equally objectionable.”<sup>100</sup> He believed that “context matters when reviewing race-based governmental action under the Equal Protection Clause.” Analyzing the validity of a race conscious law on a case by case basis will help show that “not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.”<sup>101</sup> By taking the context into consideration, Justice Breyer believed that the school districts’ plans were narrowly tailored” to achieve a “compelling” government interest.

For Justice Breyer, there were three compelling interests for use of the plans in question. While the plurality defined the interests of the plans as achieving a racial balance, Justice Breyer described the interests as promoting or preserving greater racial “integration” of public schools. Considering our nation’s history with racial segregation in education, Justice Breyer argued that it is hardly surprising that educational institutions feel that they have a “moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”<sup>102</sup> Therefore, he saw the first interest as compelling.

The second interest involved an educational element: “an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools.” He

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<sup>99</sup> 551 U.S. 701 at 862

<sup>100</sup> 551 U.S. 701 at 833

<sup>101</sup> 551 U.S. 701 at 833

<sup>102</sup> 551 U.S. 701 at 838

looked at studies to analyze the consequences of his opinion if carried out. To Justice Breyer, the studies suggested that “children taken from those schools and placed in integrated settings often show positive academic gains.” Therefore, Justice Breyer saw an “educational interest in racially integrated schools as well established and strong.”<sup>103</sup> Another likely consequence of enhanced integration was that Black alumni of integrated schools may be “more likely to move into occupations traditionally closed to African-Americans, and to earn more money in those fields.”<sup>104</sup>

He saw the third interest as democratic: “an interest in producing an educational environment that reflects the “pluralistic society” in which our children will live.” To Justice Breyer, this interest was compelling because it is one that can help “our children learn to work and play together with children of different racial backgrounds.”<sup>105</sup> He found all of three interests compelling because “primary and secondary schools are where the education of this Nation’s children begins, where each of us begins to absorb those values we carry with us to the end of our days.”<sup>106</sup> He quoted Justice Marshall to say that “unless our children begin to learn together, there is little hope that our people will ever learn to live together.”<sup>107</sup>

He then argued that the school districts’ plans were narrowly tailored to “achieve these compelling objectives.”<sup>108</sup> For one, the predominant factor in these plans was student choice, not race. In more than 80% of instances in Seattle’s school district, choice alone determined “which high schools Seattle’s ninth graders attended.”<sup>109</sup> Justice Breyer argued that race-conscious ranges

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<sup>103</sup> 551 U.S. 701 at 839

<sup>104</sup> 551 U.S. 701 at 839

<sup>105</sup> 551 U.S. 701 at 840

<sup>106</sup> 551 U.S. 701 at 842

<sup>107</sup> 551 U.S. 701 at 842

<sup>108</sup> 551 U.S. 701 at 846

<sup>109</sup> 551 U.S. 701 at 846

at issue in these cases often have no effect, “because the particular school is not oversubscribed in the year in question.”

He also saw the plans as narrowly tailored because broad-range limits on voluntary school choice plans were less burdensome. Hence, they were more narrowly tailored than other race-conscious restrictions this Court has previously approved. For Justice Breyer, race became a factor in only a fraction of students' non-merit-based assignments--not in large numbers of students' merit-based applications. In other words, because the districts plans did not replace merit awards with awards contingent upon race, Justice Breyer argued that “the school plans under review d[id] not involve the kind of race-based harm that has led this Court, in other contexts, to find the use of race-conscious criteria unconstitutional.”<sup>110</sup> Moreover, he argued that the effect of applying race-conscious criteria here affects potentially disadvantaged students less severely, not more severely, than the criteria at issue in *Grutter*. Disappointed students were not rejected from a State’s flagship graduate program; they simply attended a different one of the district's many public schools, “which in aspiration and in fact [were] substantially equal.”<sup>111</sup>

Justice Breyer argued that the manner in which the school boards developed these plans itself reflects "narrow tailoring." In other words, “each plan embodied the results of local experience and community consultation.” Justice Breyer stated that “each plan [was] the product of a process that has sought to enhance student choice, while diminishing the need for mandatory busing; and each plan's use of race-conscious elements is diminished compared to the use of race in preceding integration plans.”<sup>112</sup> In essence, the plans “reflect[ed] efforts to overcome a history of segregation, embody the results of broad experience and community consultation, s[ought] to expand student choice while reducing the need for mandatory busing, and use[d] race-conscious

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<sup>110</sup> 551 U.S. 701 at 836

<sup>111</sup> 551 U.S. 701 at 847

<sup>112</sup> 551 U.S. 701 at 848

criteria in highly limited ways that diminish the use of race compared to preceding integration efforts.”<sup>113</sup>

To Justice Breyer, both “districts rethought their methods over time and explored a wide range of other means, including non-race-conscious policies.” They realized that to achieve their intended goals, they had to use race conscious criteria in “limited and gradually diminishing ways.” Because the districts’ plans did not “impose burdens unfairly upon members of one race alone” but instead sought benefits “for members of all races alike,” Justice Breyer argued that the plans pass both parts of the strict scrutiny test. Therefore, he felt that the plans were permitted under the constitution.

In his dissent, Justice Breyer used the Active Liberty Approach quite extensively. In order to see whether Breyer used the Active Liberty approach, we had to do five things: 1) we had to identify if Justice Breyer analyzed the **purposes of the founders or framers** when looking at a constitutional text or phrase. In this case, the constitutional text was the Equal Protection Clause; 2) we had to see if Justice Breyer analyzed the **purposes of the law(s) or policy in question**. In this case, the laws in question were the Seattle and Jefferson County School desegregation plans; 3) we had to determine if Justice Breyer discussed the **perceived consequences** of the decision that the Supreme Court made. Because Breyer voted in the dissent, he looked at the perceived consequences of the decision that the Court made, in addition to the perceived consequences of his dissent if his opinion reached enough votes to become a majority; 4) we had to determine if he pointed out a **democratic ideal** or what he saw as the task of the

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<sup>113</sup> 551 U.S. 701 at 835

Constitution as a whole. He did this several times throughout his dissent; and finally, 5) we had to determine if Justice Breyer advocated for the practice of **judicial modesty**. On several occasions throughout Justice Breyer's dissent, he favored the court's deference to the decisions of other more democratic institutions of our government. Out of the five factors needed to in order to prove that the Active Liberty approach was applied in this case, Justice Breyer used all five.

### **1. Purposes of the Founders or Framers**

In this case, the constitutional text in question was the Equal Protection Clause. The petitioners, a parents' association and the parent of a student, brought actions against the public school districts, challenging the districts' plans as a violation of this constitutional law. Justice Breyer saw this challenge as invalid, citing that a "longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it."<sup>114</sup> To Justice Breyer, this unbroken line of legal authority did not arise from long held beliefs or tradition, but from consideration of the founder's true understanding of the purposes of the Equal Protection Clause. In his dissent, Justice Breyer stated that "[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated . . . all the civil rights that the superior race enjoys."<sup>115</sup> To Justice Breyer, those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to

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<sup>114</sup> 551 U.S. 701 at 823

<sup>115</sup> 551 U.S. 701 at 830

further that purpose, namely to bring the races together.<sup>116</sup> Therefore, Courts of the past knew that the Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races.<sup>117</sup> This helped them determine which race-conscious laws were made to promote or inhibit racial diversity. To Justice Breyer, the districts' plans were made to promote diversity. Therefore, they were in line with the founders' purpose and understanding.

## **2. An Analysis of the Purposes of the Law(s) in Question**

In order to determine whether the race-conscious laws in question were truly in line with the founders' purpose and understanding, Justice Breyer looked at the intent of Seattle and Jefferson County's plans. He looked at the history of each state and their past struggles with desegregation in order to put each district's plan into a specific context. One purpose of the law in question was to remedy adverse educational effects produced by and associated with highly segregated schools. Other educational goals included a district-wide commitment to high quality public schools, increased pupil assignment to neighborhood schools, diminished use of busing, greater student choice and reduced risk of White flight.<sup>118</sup>

For example, in a 1999 Jefferson County court case, several parents brought a lawsuit attacking the plan's use of racial guidelines at one of the district's magnet schools. They asked the court to dissolve the desegregation order and to hold the use of magnet school racial guidelines unconstitutional. The board opposed the dissolution, citing that the Jefferson County School Board had "treated the ideal of an integrated system as much more than a legal

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<sup>116</sup> 551 U.S. 701 at 829

<sup>117</sup> 551 U.S. 701 at 864

<sup>118</sup> 551 U.S. 701 at 820

obligation--they consider it a positive, desirable policy and an essential element of any well-rounded public school education." This was the goal of Jefferson County. The plan in question was their means of achieving this goal.<sup>119</sup>

Another example featured an NAACP Challenge to a Seattle school district. In 1966, the NAACP filed a federal lawsuit against the school board, claiming that the board had "unlawfully and unconstitutionally" "establish[ed]" and "maintain[ed]" a system of "racially segregated public schools." The complaint said that 77% of Black public elementary school students in Seattle attended 9 of the city's 86 elementary schools and that 23 of the remaining schools had no Black students at all.<sup>120</sup> The school board, at first, responded by introducing a plan that required race-based transfers and mandatory busing. This plan provoked considerable local opposition.

They were challenged again by the NAACP. This time, the NAACP argued that "that the Seattle School Board had created or perpetuated unlawful racial segregation through, e.g., certain school-transfer criteria, a construction program that needlessly built new schools in White areas, district line-drawing criteria, the maintenance of inferior facilities at Black schools, the use of explicit racial criteria in the assignment of teachers and other staff, and a general pattern of delay in respect to the implementation of promised desegregation efforts."<sup>121</sup> The School board responded with the "Seattle Plan," which paired (or "triaded") "imbalanced" Black schools with "imbalanced" White schools and promoted integration among the students. Because mandatory busing was still in place as a means to achieve this goal, the plan was vigorously opposed.

By 1988, many White families had left the school district, and many Asian families had moved in. "The cost of busing, the harm that members of all racial communities feared that the

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<sup>119</sup> 551 U.S. 701 at 819

<sup>120</sup> 551 U.S. 701 at 808

<sup>121</sup> 551 U.S. 701 at 810

Seattle Plan caused, the desire to attract White families back to the public schools, and the interest in providing greater school choice led the board to abandon busing and to substitute a new student assignment policy.”<sup>122</sup> The new plan permitted each student to choose the school he or she wished to attend, subject to race-based constraints. By 1999, they revised the plan. In doing so, they sought to deemphasize the use of racial criteria and to increase the likelihood that a student would receive an assignment at his first or second choice high school. The new plan worked as expected; between 80% and 90% of all students received their first choice assignment; between 89% and 97% received their first or second choice assignment.<sup>123</sup> The Seattle District was thus successful in expanding student choice; limiting the burdens (including busing) that earlier plans had imposed upon students and their families; and using race-conscious criteria in limited and gradually diminishing ways<sup>124</sup>—educational goals that they wanted to achieve in addition to diversifying their classrooms.

Looking at the histories of the Seattle and Jefferson County school districts convinced Justice Breyer that the purposes of the plans were to eliminate school-by-school racial isolation and increase “the degree to which racial mixture characterizes each of the district’s schools and each individual student’s public school experience.”<sup>125</sup> These purposes were in line with what Justice Breyer saw as the purposes of the Equal Protection Clause. The districts sought racial limits not to keep the races apart, but to bring them together.

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<sup>122</sup> 551 U.S. 701 at 812

<sup>123</sup> 551 U.S. 701 at 813

<sup>124</sup> 551 U.S. 701 at 820

<sup>125</sup> 551 U.S. 701 at 838

### 3. Perceived Consequences

Justice Breyer discussed consequences in an effort to determine whether such consequences were consistent with the basic purposes of the Equal Protection Clause. In fact, in his dissent, Justice Breyer devoted a section solely to discuss consequences.<sup>126</sup>

For Justice Breyer, the plurality's decision ignored several decades of legal precedent, thereby disregarding the principle of stare decisis. He argued that "for several decades, this Court has rested its public school decisions upon *Swann's*<sup>127</sup> basic view that the Constitution grants local school districts a significant degree of leeway where the inclusive use of race-conscious criteria is at issue."<sup>128</sup> But after today's decision, localities will have to cope with the difficult problems they face (including resegregation), deprived of one means they may find necessary.<sup>129</sup>

Because the vestiges of past segregation are still in our schools and society, Justice Breyer wanted us to recognize that school districts must find effective and efficient ways to alleviate these continuing inequities. He argued that the Court's decision would deprive those local officials of legal permission to use means they once found indispensable to combating persisting injustices.<sup>130</sup> Given the conditions in which school boards work to set policy they needed all of the means presently at their disposal to combat those problems. Yet the plurality would deprive them of at least one tool that some districts consider vital--the limited use of broad race-conscious student population ranges.<sup>131</sup> This in essence would upset settled expectations, create legal uncertainty, and threaten to produce considerable further litigation, aggravating race-related conflict instead of "accommodating different good-faith visions of our country and our

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<sup>126</sup> Located: 551 U.S. 701 at 858-863

<sup>127</sup> *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1

<sup>128</sup> 551 U.S. 701 at 866

<sup>129</sup> 551 U.S. 701 at 866

<sup>130</sup> 551 U.S. 701 at 845

<sup>131</sup> 551 U.S. 701 at 862

Constitution”<sup>132</sup> This in turn would compromise America’s efforts to create, out of its diversity, one Nation<sup>133</sup>-- an essential purpose of the Constitution and our democratic society.<sup>134</sup>

Justice Breyer also discussed consequences that would arise if his opinion received enough votes to become the majority. He cited studies to suggest that his decision will help to improve the education among our Nation’s students. One study suggested that “Black children from segregated educational environments significantly increase[d] their achievement levels once they [were] placed in a more integrated setting.”<sup>135</sup> In Louisville, the achievement gap between Black and White elementary school students grew substantially smaller (by seven percentage points) after the integration plan was implemented in 1975. Conversely, evidence from a district in Norfolk, Virginia, showed that resegregated schools led to a decline in the achievement test scores of children of all races.<sup>136</sup>

He also suggested that his opinion might help to improve interracial relations. One study documented that “Black and White students in desegregated schools [we]re less racially prejudiced than those in segregated schools,” and that “interracial contact in desegregated schools [led] to an increase in interracial sociability and friendship.”<sup>137</sup> He cited other studies to show that “Black and White students who attend integrated schools [we]re more likely to work in desegregated companies after graduation than students who attended racially isolated schools.” Further research had “shown that the desegregation of schools can help bring adult communities together by reducing segregated housing.” In Justice Breyer’s research, he found

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<sup>132</sup> 551 U.S. 701 at 867

<sup>133</sup> 551 U.S. 701 at 863

<sup>134</sup> Breyer, Stephen G. 2005. *Active Liberty: interpreting our democratic Constitution*. Random House Digital, Inc. pg 82: “Student body diversity...prepares students for an increasingly diverse workforce and better prepares them as professions...[E]ducation [is] pivotal to sustaining our political and cultural heritage [and plays] a fundamental role in maintaining the fabric of society.”

<sup>135</sup> 551 U.S. 701 at 840

<sup>136</sup> 551 U.S. 701 at 840

<sup>137</sup> 551 U.S. 701 at 841

that “cities that have implemented successful school desegregation plans have witnessed increased interracial contact and neighborhoods that tend to become less racially segregated.” To Justice Breyer, These effects not only reinforced the prior gains of integrated primary and secondary education. He argued that they also foresaw a time when there was less need to use race-conscious criteria.<sup>138</sup>

#### **4. Democratic Ideal**

At several places in his dissent, Justice Breyer discussed what he saw as the task of the Constitution as a whole. He argued that “the Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time.” Notwithstanding the fact that the Constitution was originally ratified in a time when slaves and women were not citizens, the document has evolved over time to ensure that “sovereign authority originated in the people.” The definition of people, through time, embraced democratic expansion and came to mean “every member of the community.”<sup>139</sup> Because the ruling hindered good faith efforts to learn in a racially inclusive environment, which in turn would have helped one become a more informed citizen and a active participant in a democratic society, Justice Breyer saw the Courts decision as one that was not in line with task of the Constitution—particularly the purposes of the Equal Protection Clause.

#### **5. Judicial Modesty**

Justice Breyer argued for the courts to use judicial modesty, or to defer to the decisions of other more democratic institutions of our government. When it came to alleviating inequities that followed from segregation, Justice Breyer believed that “school authorities ha[d] the primary

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<sup>138</sup> 551 U.S. 701 at 841

<sup>139</sup> Breyer, Stephen G. 2005. *Active Liberty: interpreting our democratic Constitution*. Random House Digital, Inc. pg 22

responsibility for elucidating, assessing, and solving these problems.” When the decision of *Brown v. Board* was rendered, the Court allowed discretion amongst the schools districts when deciding how to comply with the ruling. Justice Breyer argued that after *Brown*, this Court told school districts previously segregated by law “what they must do at a minimum to comply with *Brown*'s constitutional holding.”<sup>140</sup> The measures required by those cases often included “race-conscious practices, such as mandatory busing and race-based restrictions on voluntary transfers.” Beyond those minimum requirements, the Court left much of the determination of how to achieve integration to the judgment of local communities.<sup>141</sup>

Justice Breyer wanted the plurality to understand that Justices are not in the capacity to handle the “complexity of the tasks and the practical difficulties that local school boards face when they seek to achieve greater racial integration.”<sup>142</sup> The boards work in communities “where demographic patterns change, where they must meet traditional learning goals, where they must attract and retain effective teachers, where they should (and will) take account of parents' views and maintain their commitment to public school education, where they must adapt to court intervention, where they must encourage voluntary student and parent action--where they will find that their own good faith, their knowledge, and their understanding of local circumstances are always necessary but often insufficient to solve the problems at hand.”<sup>143</sup> To Justice Breyer, these facts helped to explain why “the law often leaves legislatures, city councils, school boards, and voters with a broad range of choice, thereby giving “different communities” the opportunity

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<sup>140</sup> 551 U.S. 701 at 805

<sup>141</sup> 551 U.S. 701 at 805

<sup>142</sup> 551 U.S. 701 at 823

<sup>143</sup> 551 U.S. 701 at 822

to “try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs.”<sup>144</sup>

Justice Breyer conceded that he had little knowledge about the best ways “to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing de facto segregation, troubled inner city schooling, and poverty correlated with race.” One thing he knew for sure was that “the Constitution d[id] not authorize judges to dictate solutions to these problems.” One of the tasks of the Constitution was to “create a democratic political system through which the people themselves must together find answers.” And it was for the people to debate “how best to educate the Nation's children and how best to administer America's schools to achieve that aim.” In essence, it was for the people to decide whether the “way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Thus, it was best for the Court to leave these democratic institutions to their work. With this said, the main thing the Courts would have to consider was “whether the action of school authorities constitute[d] good faith implementation of the governing constitutional principles.”<sup>145</sup> Outside of that, Justice Breyer argued that much discretion was given to the more democratic institutions in our society.

### **Does Breyer Use His Reasoning as a Means to Liberal or Conservative Outcome?**

Since we have determined that Justice Breyer used the Active Liberty approach as a means to justify his dissent, we need to see if the same approach was used to reach a conservative or liberal outcome. Is Justice Breyer’s reasoning to uphold the Affirmative Action policies of Seattle and Jefferson County more akin to conservative viewpoints or liberal

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<sup>144</sup> 551 U.S. 701 at 823

<sup>145</sup> 551 U.S. 701 at 850

viewpoints of Affirmative Action? To answer this, we need to look back to what scholars view as the conservative and liberal position in the Affirmative Action debate. From my analysis, I realized that Justice Breyer used the Active Liberty approach partly as a means to a liberal outcome.

In an article entitled “*Racism, Conservatism, Affirmative Action, and Intellectual Sophistication: A Matter of Principled Conservatism or Group Dominance*,” Jim Sidanius, Felicia Pratto and Lawrence Bobo argued that conservatives who generally voice opposition to affirmative action policies are not “driven by racism but rather by concern for “equity,” “color-blindness,” and “genuine” conservative values.”<sup>146</sup> They also stated that a number of neoconservative intellectuals have even suggested that the major antidote to racial discrimination is more conservatism and more, not less, free-market capitalism. Conservatives generally voice opposition to redistributive social policies because it is believed that such policies compromise conservative notions of “fairness” and “self-reliance.”<sup>147</sup>

In an article entitled, *Diversity Perversity*, Wendy Kaminer argued that conservatives, if forced to accept Affirmative Action at all, would only allow it to be used remedially.” In other words, to conservatives “an institution that hasn't discriminated against racial minorities in the past may not discriminate in favor of them in the present, and institutions that are guilty of prior discrimination may, in theory, only employ racial preferences remedially, until the prior offense is cured.”<sup>148</sup> In essence, conservatives are more likely than liberals to embrace the idea that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>149</sup>

<sup>146</sup> Sidanius, Jim, Felicia Pratto, and Lawrence Bobo. 1996. “Racism, Conservatism, Affirmative Action, and Intellectual Sophistication: A Matter of Principled Conservatism or Group Dominance?” *Journal of Personality and Social Psychology* 70(3): 476-490. (Accessed March 31, 2011). Pg 476

<sup>147</sup> Ibid

<sup>148</sup> Wendy Kaminer. 2002. “On the Contrary: Diversity Perversity.” [http://prospect.org/cs/articles?article=on\\_the\\_contrary\\_072902](http://prospect.org/cs/articles?article=on_the_contrary_072902) (Accessed March 31, 2011).

<sup>149</sup> 551 U.S. 701 at 748

They are also more likely to investigate whether an institution has been found to discriminate in the past. This will help them determine whether the institution can use affirmative action to increase the diversity numbers.

These arguments mirror that which were given by Chief Justice Roberts in *Parents Involved in Community Schools v. Seattle School District No. 1* (551 U.S. 701). Speaking for the majority, Chief Justice Roberts argued that Seattle's plan was not justified because this district did not prove that their school systems were ever legally segregated by law. Jefferson County's plan was not justified because this county had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects," and thus had achieved "unitary" status.<sup>150</sup> This reasoning suggests that the majority believes that Affirmative Action efforts can be made only to remedy past *legal* discrimination, not necessarily to impose racial classifications in an effort to achieve diversity. Therefore, the arguments of the majority are more akin to what scholars would call the conservative viewpoints of Affirmative Action.

Justice Breyer discusses at length why these arguments are unsound. The arguments he uses in his dissent are very similar to that which were given by liberal political analysts like Randall Kennedy, Ronald Brownstein, Cornel West, Kenneth S. Tollett and Paul Starr. These political analysts are contributors to a publication entitled *The American Prospect*, an "authoritative magazine of liberal ideas, committed to a just society, an enriched democracy, and effective liberal politics."<sup>151</sup> Like these analysts, Justice Breyer views Affirmative Action as not only sufficient, but necessary to achieve true equality in America. On several occasions in his dissent, Justice Breyer cited several affirmative action articles and cases to argue "that "[a]ttending an ethnically diverse school, could help prepare "minority children for citizenship in

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<sup>150</sup> 551 U.S. 701 at 721

<sup>151</sup> "About The American Prospect-Mission." [http://prospect.org/cs/about\\_tap/our\\_mission](http://prospect.org/cs/about_tap/our_mission) (Accessed March 31, 2011).

our pluralistic society.” This would “hopefully [teach] members of the racial majority to live in harmony and mutual respect with children of minority heritage.”<sup>152</sup> He found it counterproductive to use plans that did not consider race at all. Looking at the history of Jefferson County, Justice Breyer argued that attempts to eliminate any consideration of race from desegregation efforts will “[prove] ineffective,”<sup>153</sup> therefore suggesting that it is necessary to take race into account when attempting to promote racial equality in education.

In an article entitled *The Enduring Relevance of Affirmative Action*, Randall Kennedy views Affirmative Action to be within the lines of liberal thinking of an inclusive society with full opportunity for all.<sup>154</sup> This line of thinking is not far removed from Justice Breyer’s argument that those who drafted the Equal Protection Clause would have understood the legal and practical difference between the use of race-conscious criteria made to keep the races apart, and the use of race-conscious criteria made to bring the races together.<sup>155</sup> In the case at hand, Justice Breyer believed that the school boards were using race conscious criteria as a means to “bring the races together” and to increase inclusiveness. To Justice Breyer, the inclusivity can transcend education and make its way into the workplace. He cited studies suggesting, “that Black alumni of integrated schools [were] more likely to move into occupations traditionally closed to African-Americans, and to earn more money in those fields.”<sup>156</sup> He cited another study which suggested that “Black children from segregated educational environments significantly increase their achievement levels once they are placed in a more integrated setting.”<sup>157</sup> In essence, he saw Affirmative Action plans like the one in question as needed in order to promote

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<sup>152</sup> 551 U.S. 701 at 858 (cited Justice Powell’s opinion in *Bakke*, approving of the limited use of race-conscious criteria in a university-admissions “affirmative action” case)

<sup>153</sup> 551 U.S. 701 at 859

<sup>154</sup> Kennedy, R. (n.d.). *The Enduring Relevance of Affirmative Action*. Retrieved May 9, 2011, from [http://prospect.org/cs/articles?article=the\\_enduring\\_relevance\\_of\\_affirmative\\_action](http://prospect.org/cs/articles?article=the_enduring_relevance_of_affirmative_action)

<sup>155</sup> 551 U.S. 701 at 829

<sup>156</sup> 551 U.S. 701 at 840

<sup>157</sup> 551 U.S. 701 at 840

progress among minorities and to facilitate positive relations amongst different races. Justice Breyer's arguments are more akin to Kennedy's view that Affirmative Action is both a major strategy and central accomplishment of the modern struggle for equality.<sup>158</sup> They are less akin to conservative views that see Affirmative Action as a redistributive social policy that compromises conservative notions of "fairness," "equality," and "self-reliance."

### **Conclusion**

In at least one case, Justice Breyer used to Active Liberty approach as a means to justify his decision. Because there were very few cases available to analyze, I cannot definitively say that Justice Breyer uses the active liberty approach in cases surrounding affirmative action. Considering the brevity of Justice Breyer's opinion in *Gratz v. Bollinger* and his lengthy opinion in *Parents v. Seattle*, I wondered why the active liberty approach was used extensively in later cases, but not so much in the earlier ones. Paul Gewirtz, a Professor of Constitutional Law at Yale Law School, suggests that the time the cases were decided may have something to do with the extent to which Justice Breyer develops his opinions. Active Liberty is the first book Justice Breyer writes in which he lays out his interpretational methodology. Published in 2005 (after *Gratz v. Bollinger* and *Grutter v. Bollinger*), these opinions reflect Justice Breyer's ability to develop his methodology over time. Gerwitz argues that "Breyer's earlier opinions, we have seen, evolved into this book." His recent opinions demonstrate that his book is now producing evolutions in his opinions, in which Justice Breyer is making more self-conscious "uses of [the] ideas developed in his book." With this, we should look out for more opinions in which Justice

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<sup>158</sup> Kennedy, R. (n.d.). The Enduring Relevance of Affirmative Action. Retrieved May 9, 2011, from [http://prospect.org/cs/articles?article=the\\_enduring\\_relevance\\_of\\_affirmative\\_action](http://prospect.org/cs/articles?article=the_enduring_relevance_of_affirmative_action)

Breyer self-consciously deploys his methodological emphasis on looking to purposes and consequences in interpreting laws.<sup>159</sup>

In this paper, I have operationalized the active liberty methodology in order to see if Justice Breyer uses this methodology in his opinions, concurrences or dissents. I have looked at one of the six subject areas that Justice Breyer expounds upon in his book *Active Liberty*- namely Affirmative Action- in order to see if the active liberty approach was used as a means to justify Justice Breyer's decisions. If the Active Liberty approach was used, I looked to see if Justice Breyer was embracing liberal or conservative viewpoints of affirmative action when he wrote his opinions, concurrences or dissents. In the cases in which Breyer uses the active liberty approach, we saw that he was embracing more liberal viewpoints of Affirmative Action than conservative viewpoints. Seeing that there were very few cases to analyze, and that the cases showed mixed results, I cannot conclusively say that Justice Breyer uses the active liberty approach as a means to justify his decision in Affirmative Action cases. But, as mentioned, some of the cases under review were written *before* Active Liberty was published, while others were written *after* its publication. Taking this into consideration gives us the chance to understand why Justice Breyer's arguments may be more developed in later Affirmative Action cases than in earlier ones.

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<sup>159</sup> Gewirtz, P. (2006). The Pragmatic Passion of Stephen Breyer. *The Yale Law Journal*, 115(1675). Retrieved from [http://www.lexisnexis.com.libproxy.albany.edu/lncui2api/results/docview/docview.do?docLinkInd=true&risb=21\\_T11461513397&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUriKey=29\\_T11461514200&cisb=22\\_T11461513399&treeMax=true&treeWidth=0&selRCNodeID=5&nodeStateId=411en\\_US,1,2&docsInCategory=2&csi=7363&docNo=1](http://www.lexisnexis.com.libproxy.albany.edu/lncui2api/results/docview/docview.do?docLinkInd=true&risb=21_T11461513397&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUriKey=29_T11461514200&cisb=22_T11461513399&treeMax=true&treeWidth=0&selRCNodeID=5&nodeStateId=411en_US,1,2&docsInCategory=2&csi=7363&docNo=1) , pg 8